

SANJIV

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 1566 OF 2006**

Smt. Gunabai D. Nayak

....Petitioner

Vs.

Shri Vitthal M. Burkul & Anr.

....

Respondents

Mr Ganesh Gole for Petitioner.

Mr. R. S. Kulkarni, for respondent 1.

Ms. M. M. Deshmukh, APP for the State.

CORAM : SMT. RANJANA DESAI, J.

DATE : 14TH NOVEMBER, 2006.

P. C.:-

1. The petitioner, has challenged in this writ petition order dated 16/03/2006 passed by Judicial Magistrate, First Class, Court No.7, Pune rejecting the application filed by the petitioner for submitting herself for further cross-examination and requesting the learned Magistrate to issue summons to certain persons as

witnesses and the order dated 13/06/2006 passed by the 13th Ad-hoc Additional Sessions Judge, Pune in Revision Application No. 412 of 2006, whereby the learned Sessions Judge dismissed the revision application filed by the petitioner against the said order.

2. The petitioner is a widow. She is working in Pune Municipal Corporation. It appears that a private complaint was filed by the petitioner being Regular Criminal Case No. 839 of 1997 in the Court of Judicial Magistrate, First Class, Pune. It is her case that, her daughters Hema and Sona are studying in New English School at Fursungi. Respondent 1 was working as a clerk in the said school. According to the petitioner on 09/10/1996, the petitioner had gone to Bangalore due to some work and at that time her two daughters were alone in the house. In the evening of the same day, respondent 1 visited the petitioner's house in a drunken condition and he outraged the modesty of Hema. The petitioner, therefore, filed a private complaint under Section 354 and 509 of the Indian Penal Code against respondent 1.

3. After recording the verification of the petitioner, the process was issued against respondent 1. The petitioner appeared before the learned Magistrate and her examination-in-chief was recorded on 21/10/2005. According to the petitioner, on that day she was partially cross-examined and the case was adjourned. It is further the petitioner's case that, there was some doubt as to whether the said proceedings were summary or regular in nature. Therefore, the petitioner remained absent on the further dates under the impression that until the nature of proceedings was decided, they may not progress further. It is further averred in the petition that two more

dates i. e. 22/01/2005 and 09/01/2006 were fixed for further hearing and for final argument.

4. On 12/01/2006, the petitioner filed an application under Section 311 of the Criminal Procedure Code ("The Code", for short) praying that she may be permitted to subject herself to cross-examination and certain other witnesses be called for as witnesses and witness summons be issued to them. The learned Magistrate rejected the application. Revision carried from this order was also rejected and hence this petition.

5. I have heard the learned counsel for the parties at length. The learned counsel for the petitioner drew my attention to Section 311 of the Code. He contended that to arrive at the just decision of the case, it was obligatory on the learned Magistrate to grant the petitioner's application. He submitted that the learned Magistrate should have taken the peculiar facts of the case into account that the petitioner is a widow and that her case is that her daughter was molested and allowed the petitioner to lead further evidence. He, in support of his submission, placed a reliance on the judgment of the Supreme Court in *Mohanlal Shamji Soni Vs. Union of India and anr.* 1991 Cri. L. J. 1521 and the judgment of the Rajasthan High Court in *Rahul @ Babu Lal Vs. State of Rajasthan*, 1998 Cri. L. J. 3664. He submitted that in the circumstances, this court should set aside the impugned order.

6. On the other hand, learned counsel for respondent 1 contended that the complainant and her advocate consistently remained absent. He submitted that, in the circumstances the order passed by the court below needs no interference. In support of his

submission, he relied upon the judgment of the Patna High Court in *Keshav Choudhary Vs. State of Bihar* 2000 Cri. L. J. 3705.

7. In my opinion, in the peculiar facts and circumstances of the case, the learned Magistrate ought to have allowed the application of the petitioner. It is true that the petitioner and her counsel have remained absent on several dates, but it is pointed out to me that the petitioner who is a widow is not educated and she is not aware about the procedure. It is stated in the petition that there was some confusion as to which procedure was to be followed and on which date the petitioner should remain present in the court. The petitioner was under the impression that the case may not proceed further till it is decided as to which procedure is to be followed. In the facts of this case, it is reasonable to presume that the petitioner did not remain present in the court because of the reasons stated in the petition. In any case, in the interest of justice and to arrive at just decision, the learned Magistrate ought to have granted the petitioner's application. In this connection, the reliance placed on *Mohanlal's case* (supra) is apt. In that case the Supreme Court was dealing with Section 540 of Criminal Procedure Code (5 of 1898). The said section is equivalent to Section 311 of the Code. The Supreme Court held that power to summon witnesses available in Section 540 can be exercised at any stage of proceeding if examination of such person is essential for just decision of the case. The Supreme Court clarified that opportunity to rebut should be given to other party whenever new evidence is admitted under Section 540. Following are the relevant observations of the Supreme Court.

“ It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. It is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions S. 540 of the Code (S. 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or reexamine any person in attendance though not summoned as a witness or recall and reexamine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated. The very usage of the words such as 'any Court' , 'at any stage' or 'of any enquiry', trial or other proceedings', ' any person' and ' any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.”

8. It is true that in this case, the statement of the accused under Section 313 of the Code of Criminal Procedure is recorded. However, that does not prevent the learned Magistrate from resorting to Section 311 of the Code. In this connection, I may usefully refer to

the judgment of the Rajasthan High Court in *Rahul's case (supra)*. In that case the accused were charged for offences under the Narcotic Drugs and Psychotropic Substances Act. The prosecution had closed its evidence. The accused was examined under Section 313 of the Code. The question was whether additional witnesses whose names were not given in the list of witnesses should be summoned in exercise of power under Section 311 of the Code. The Rajasthan High Court was of the view that the evidence was essential to establish that at every stage goods involved in crime were in proper custody and hence summoning of additional witnesses in exercise of power under Section 311 was not illegal.

9. In my opinion, reliance placed by respondent 1 on *Keshav's case (supra)* is misplaced. The facts of that case are not comparable to the facts of the present case. In that case bailable and non bailable warrants were issued against the witnesses but the witnesses remained absent for two years. In the circumstances, the learned judge of the Patna High Court held that prosecution could not apply for examination of witnesses under Section 311 of the Code. The ratio of this case is not attracted to the facts of the present case.

10. The petitioner herein is a widow who has two school going daughters. She is not educated. Her case that there was some confusion about the procedure to be followed cannot be lightly rejected. Even educated persons can get confused about court procedure. It appears that the petitioner was not properly guided by her lawyer. The allegations made in the complaint must also be taken into account. The petitioner case is that the accused who is working in her daughter's school as a clerk came to her house in her absence

and outraged the modesty of her daughter Hema. Such allegations must be properly investigated. The mistake of the lawyer and disadvantaged status of the complainant should not result in the accused getting acquitted because of paucity of evidence. At the same time the accused must be given a chance to rebut the evidence laid by the complainant. It is true that Section 311 aims at helping the court in arriving at just decision. It cannot be allowed to be used to cause harassment to the accused. But this assessment must be made by the trial court. In this case, in my opinion, the courts below have not considered the case in its proper perspective and hence the impugned orders will have to be set aside.

11. Though I feel that the impugned orders must be set aside, I must make it clear that this indulgence granted by the court should not be misused by the complainant. The roznama shows the number of dates on which the petitioner and her advocate have remained absent. The explanation offered by the petitioner has been accepted by me in the interest of justice. But in future the complainant and her advocate will have to be careful. They must help the court to conclude the trial expeditiously. The accused must also cooperate. If in future, the complainant and her advocate are found negligent or careless, the court will be at liberty to pass such order as it deems fit.

12. In the view that I have taken the impugned orders dated 16/03/2006 and 13/06/2006 are set aside. Application dated 21/01/2006 at Exhibit 26 in Criminal Complaint No. 839 of 1997 is allowed.

13. The petition is disposed of in the above terms.

(SMT. RANJANA DESAI, J)